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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

XILING CHEN,

Plaintiff,

v.

ALBERTO GONZALES, Attorney General of
 the United States; MICHAEL CHERTOFF,
 Secretary of the Department of Homeland
 Security; EMILIO GONZALES, Director of
 United States Citizenship & Immigration
 Services; ROBERT MEULLER, Director of the
 Federal Bureau of Investigations; GERARD
 HEINAUER, Director of the Nebraska Service
 Center,

Defendants.

No. C 07-4698 JW

DEFENDANTS' REPLY TO PLAINTIFF'S
 OPPOSITION TO DEFENDANTS'
 MOTION FOR SUMMARY JUDGMENT

Date: April 21, 2008
 Time: 9:00 a.m.
 Courtroom: 8, 4th Floor

Plaintiff Xiling Chen asks this Court to issue a writ of mandamus, compelling the Defendants to make a determination on her application for adjustment of status.

Defendants Mukasey and Mueller should be dismissed as improper defendants. *See Wang v. Gonzalez*, 2007 WL 4463009. *3 (N.D. Cal. Dec. 17, 2007).

Plaintiff argues that although the government may use unlimited discretion when granting or denying an application, there is nothing discretionary about the government's duty to adjudicate an adjustment of status application within a reasonable time frame.

Defendants' Reply
 C07-4698 JW

1 There is no Ninth Circuit authority addressing this issue. However, this Court recently
2 addressed the TRAC factors in *Wang Yi Chao v. Gonzales*, 2007 WL 3022548 (N.D. Cal. Oct. 15,
3 2007) and articulated a standard in agreement with the holdings of other courts within the district
4 that a delay of two years is presumptively unreasonable as a matter of law. See, e.g. *Dong v.*
5 *Chertoff*, 2007 WL 2601107 (N.D. Cal. Sept. 6, 2007) (holding delay of close to two years
6 unreasonable as a matter of law); *Clayton v. Chertoff*, 2007 WL 2904049 at *6 (N.D. Cal. Oct. 1,
7 2007) (recognizing that courts within the district have adopted two years as an unreasonable
8 amount of time and that under two years is not unreasonable.)

9 Plaintiff's application has been pending since January 2005, when she became eligible due to
10 her husband's status. While this is more than two years, "[w]hat constitutes an unreasonable delay
11 in the context of immigration applications depends to a great extent on the facts of the particular
12 case." *Gelfer v. Chertoff*, 2007 WL 902382 at *2 (N.D. Cal. Mar. 22, 2007). It is Defendants'
13 position that they have successfully challenged the Court's subject matter jurisdiction or, in the
14 alternative, demonstrated that the delay here has been reasonable. Defendants provided the
15 declaration of Mark A. Rohrs, the Assistant Center Director at the Nebraska Service Center for
16 USCIS, who is familiar with the procedures followed by the USCIS when an alien applies for an
17 adjustment of status, and has reviewed Plaintiff's application.

18 Rohrs attests that in January 2005, Plaintiff's husband's application for adjustment of status
19 was approved, the basis for her own application. Rohrs Decl., ¶ 13. Plaintiff's application is still
20 pending, because the background checks are incomplete and ongoing. *Id.*, ¶ 25. On April 2, 2008,
21 USCIS in conjunction with the Federal Bureau of Investigation (FBI) released a joint plan to eliminate
22 the backlog of name checks pending with the FBI, attached at Exhibit A. Additionally,
23 pursuant to USCIS policy, as articulated in the memorandum entitled Revised National Security
24 Adjudication and Reporting Requirements by Michael Aytes, Associate Director of Domestic
25 Operations, HQ 70/23 and 70/28.1 dated February 4, 2008, attached as Exhibit B, all I-485
26 applications that have been pending for more than 180 days will be reviewed. If during this review
27 it appears as though the applicant is eligible "but for" the pending FBI name check, the application
28 will not be delayed any longer and should be processed for a legal permanent resident card.

1 USCIS is processing Plaintiff's application in accordance with the Aytes memorandum and
2 with the resources allocated and anticipates adjudicating Plaintiff's application by April 30, 2008.

3 For the foregoing reasons, the Government respectfully asks the Court to dismiss Defendants
4 Michael Mukasey and Robert Mueller, and grant the remaining Defendant's motion for summary
5 judgment as a matter of law.

6 Dated: April 7, 2008

Respectfully submitted,

7 JOSEPH P. RUSSONIELLO
8 United States Attorney

9 _____
10 /s/
11 ILA C. DEISS
12 Assistant United States Attorney
13 Attorneys for Defendants
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